BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit has not been officially reported. Said opinion was filed November 6, 1941, and appears in the record beginning at page 1239.

II.

JURISDICTION.

1. The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, 43 Stats. 938, Sec. 1217, 28 U. S. C. A. 347 (a).

2. The date of the judgment to be reviewed is November 6, 1941 (R. 1277). A petition for rehearing was denied November 26, 1941 (R. 1313).

3. Petitioner was indicted and convicted on a charge of perjury in violation of Section 125 of the Criminal Code, 35 Stat. 1111, 18 U. S. C. A., Sec. 231 (Indictment, R. 8, 16, 22).

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the petition, and in the interest of brevity the statement is not here repeated.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred:

(a) In finding and holding that the refusal of the trial court to order production of a transcript of the prior contradictory testimony of the Government's principal witnesses for the purpose of cross-examination and impeachment, while error, was harmless.

(b) In holding in effect that there was no prejudicial error, because the petitioner made no affirmative showing that his rights were prejudiced. Thus, construing Section 269 of the Judicial Code as placing the burden of showing prejudicial error on the party complaining. This is an erroneous construction of said section and in conflict with this Court's interpretation thereof.

(c) By finding and holding contrary to the record that petitioner was not limited in the exercise of his right of cross-examination of the witnesses in question, and that all of the witnesses were fully cross-examined and impeached.

(d) In placing upon petitioner the burden of affirmatively showing that the transcripts of the prior contradictory testimony contained relevant and material testimony, which would have been of assistance to him for the purpose of impeachment, when neither petitioner nor his counsel had any opportunity to examine said transcripts.

2. The Circuit Court of Appeals erred in holding that it was not error to refuse petitioner's requested charge to the effect that an established reputation for good character alone may create a reasonable doubt, although without it the other evidence might be convincing, and to charge the jury to the effect that if all the evidence in the case, including that on good reputation, convinced the

jury of petitioner's guilt beyond a reasonable doubt, then his previous good reputation could not excuse, mitigate or palliate such guilt to any extent whatever.

3. The Circuit Court of Appeals erred in holding that it was not error to refuse the requested charge that circumstantial evidence of itself would not support a charge of perjury and to charge the jury that circumstantial evidence alone was sufficient proof of the crime, for the reason that in other portions of the charge the jury was instructed as to the proper rule applicable to a perjury case.

4. The Circuit Court of Appeals erred in finding and holding that the supplemental charge given to the jury after it had been out twenty-six hours without having reached an agreement, which was followed in thirty-seven minutes by a verdict of conviction on two counts of the indictment and acquittal on three counts, was not coercive and did not constitute prejudicial error, and in finding that this supplemental instruction was substantially the same as that approved by this Court in Allen v. United States, 164 U. S. 492, 501, and that a similar charge was approved by this Court in Allis v. United States, 155 U. S. 117.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A. The decision below is contrary to and in conflict with prior decisions of this Court and other Circuit Courts of Appeal in holding, that the error committed by the trial court in refusing to order production of a transcript of the prior contradictory testimony of the Government's principal witnesses for impeachment purposes, was not prejudicial because petitioner did not make an affirmative showing that he was prejudiced thereby; thus construing Section 269 of the Judicial Code as placing the burden of showing prejudicial error on the party complaining.

McCandless v. United States, 298 U. S. 342, 347;
Williams v. Great Southern Lumber Co., 277 U. S. 19, 26;
United States v. River Rouge Co., 269 U. S. 411, 421;
United States v. Dressler, 112 Fed. (2d) 972, 978 (C. C. A. 7th);
Little v. United States, 73 Fed. (2d) 861, 866 (C. C. A. 10th);
Lynch v. Oregon Lbr. Co., 108 Fed. (2d) 283, 285 (C. C. A. 9th).

Point B. The finding and holding below that petitioner was not limited in the exercise of his right of cross-examination of the Government's principal witnesses, and that these witnesses were fully cross-examined and impeached, is not supported by the record; and the decision below is contrary to and in conflict with prior decisions of this Court, the court below and other Circuits, in holding that petitioner was not erroneously denied the right of cross-examination of these witnesses.

Alford v. United States, 282 U. S. 687, 691;

District of Columbia v. Clawans, 300 U. S. 617, 632;
Heard v. United States, 255 Fed. 829, 832 (C. C. A. 8th);
Searway v. United States, 184 Fed. 716 (C. C. A. 8th);
Chicago, M. & St. P. Ry. Co. v. Harrelson, 14 Fed. (2d) 893, 896 (C. C. A. 8th);
Henderson v. United States, 20 Fed. (2d) 90 (C. C. A. 8th);
Tacoma Ry. & Power Co. v. Cothary, 235 Fed. 872 (C. C. A. 9th);
United States v. Graham, 102 Fed. (2d) 436 (C. C. A. 2nd).

Point C. The decision below is contrary to and in conflict with a prior decision of this Court in placing the burden upon petitioner to affirmatively show, that the transcripts of prior contradictory testimony of these witnesses contained relevant and material matter, which would have assisted him in his defense by impeachment of these witnesses.

Alford v. United States, 282 U. S. 687, 692.

Point D. The decision below is contrary to and in conflict with prior decisions of this Court, the court below and other Circuit Courts of Appeal in holding that the refusal of petitioner's requested charge that an established reputation for good character alone might create a reasonable doubt, although without it the other evidence might be convincing, WAS NOT ERROR.

Edington v. United States, 164 U. S. 361, 366;
Egan v. United States, 287 Fed. 958, 968 (C. A. D. C.);
Jones v. United States, 289 Fed. 536, 538 (C. A. D. C.);
Snitkin v. United States, 265 Fed. 489, 491 (C. C. A. 7th);
Estabrook v. United States, 28 Fed. (2d) 150, 154 (C. C. A. 8th);

Perara v. United States, 235 Fed. 515, 517 (C. C. A. 8th);
Searway v. United States, 184 Fed. 716 (C. C. A. 8th).

Point E. The Court's charge to the jury that circumstantial evidence alone was sufficient proof of the crime was an erroneous statement of the law, and the Court erred in refusing petitioner's requested charge that circumstantial or corroborative evidence of itself would not support a charge of perjury.

Clayton v. United States, 284 Fed. 537, 539 (C. C. A. 4th);
United States v. Otto, 54 Fed. (2d) 277, 279 (C. C. A. 2nd);
Phair v. United States, 60 Fed. (2d) 953, 954 (C. C. A. 3rd).

The decision below is contrary to and in conflict with prior decisions of this Court and other Circuit Courts of Appeal in holding that this did not constitute error because the jury was properly instructed as to the quantum of proof required in a perjury case in another portion of the charge.

Mills v. United States, 164 U. S. 644, 646;
De Groot v. United States, 78 Fed. (2d) 244, 248 (C. C. A. 9th);
Nicola v. United States, 72 Fed. (2d) 780, 787 (C. C. A. 3rd).

Point F. The decision below in holding that the supplemental charge was not coercive when the jury, after having had the case under consideration for twenty-six hours without agreement, returned a verdict of guilty on two counts of the indictment and acquittal on three counts thirty-seven minutes after the charge was given, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power

of supervision, and is contrary to and in conflict with prior decisions of the court below and other circuits.

Stewart v. United States, 300 Fed. 769, 785 (C. C. A. 8th);

Nigro v. United States, 4 Fed. (2d) 781, 785 (C. C. A. 8th);

Edwards v. United States, 7 Fed. (2d) 598, 602 (C. C. A. 8th);

C. & E. I. Ry. Co. v. Sellars, 5 Fed. (2d) 31, 32 (C. C. A. 8th);

Gideon v. United States, 52 Fed. (2d) 427, 431 (C. C. A. 8th);

Peterson v. United States, 213 Fed. 920, 924 (C. C. A. 9th).

POINT A.

[Specification of Errors 1 (a), (b).]

The opinion of the court below holds (R. 1266) that the trial court erred in refusing to order production of prior contradictory testimony of the principal witnesses for the Government which was sought by counsel for petitioner for the purpose of impeachment. It was held (R. 1266) that, after the production of the transcript, the trial judge should have examined it and determined what portions of it might be used in the trial; that in making such rulings the Court was bound to exercise sound judicial discretion "to accord the defendant the fair trial to which he is entitled." Thus, the basic reason for petitioner's right to production of this transcript and the determination of what portions of it might be relevant and material for use at the trial in impeachment of the witnesses, was his right to a fair trial. This, however, was held (R. 1266) to be harmless error for the reason, that the Court found that the witnesses had been fully cross-examined (this finding is not supported by the record, as will be hereinafter pointed out) and that the petitioner made no affirmative showing that his rights were prejudiced.

The effect of the foregoing ruling is that petitioner was deprived of his constitutional right to a fair and impartial trial, but that such denial was harmless error. Those portions of the opinion which place the burden of showing prejudicial error on petitioner are as follows:

(R. 1263):

> "The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative. The evidence affords no ground for any such belief and there is no statement of fact throughout the briefs to justify an inference that such belief really exists."

And (R. 1266):

> "But in this case, where it is apparent that no essential ingredient of the offense was in any way dependent upon any matter contained in the transcripts and there is no reason to believe that any matter contained therein was competent, relevant or material matter of defense 'to order a new trial would be to violate the standards of Section 269 of the Judicial Code (U. S. C., Sec. 391), since the substantial rights of the defendant were not affected.' "

In this ruling and the construction placed on Section 269 of the Judicial Code the court below is in conflict with the decision of this Court in McCandless v. United States, 298 U. S. 342, where, in referring to this section of the Code, this Court states (l. c. 347):

> "That section simply requires that judgment on review shall be given after an examination of the entire record, 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. United States v. River Rouge

Co., 269 U. S. 411, 421, 70 L. Ed. 339, 346, 46 S. Ct. 144; Fillippon v. Algion Vein Slate Co., 250 U. S. 76, 82, 63 L. Ed. 853, 856, 39 S. Ct. 435; Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417." (Italics by the Court.)

This Court put a like construction upon Section 269 of the Judicial Code in Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, and United States v. River Rouge Co., 269 U. S. 411, 421. The rule thus enunciated by this Court has been followed by the Circuit Courts of Appeal in United States v. Dressler, 112 Fed. (2d) 972, 978 (C. C. A. 7th); Little v. United States, 73 Fed. (2d) 861, 866 (C. C. A. 10th), and Lynch v. Oregon Lumber Co., 108 Fed. (2d) 283, 285 (C. C. A. 9th).

The opinion below is contrary to and in conflict with all these cases.

POINT B.

[Specification of Error 1 (c).]

The opinion of the court below states (R. 1262):

> "The appellant had the right necessarily incident to fair trial to impeach the witnesses against him by compelling admissions from them on cross-examination, or, if they denied having given contradictory testimony, by producing impeaching witnesses. But the record discloses that the appellant was not limited in the exercise of this right. On the contrary, each of the witnesses was impeached. Each was cross-examined at length for appellant and it was brought out clearly as to the lawyer witnesses (for instance) that they had attempted to deceive the investigators and had stated that no return of part of their fees had been made to the company. Similarly the witnesses to the other false swearing were fully cross-examined and impeached by their own admissions."

And again it is stated (R. 1265):

> "Here appellant was accorded the right to and did

cross-examine at length and without any unreasonable limitation about what the impeached witnesses did or did not tell the investigators prior to the trial, both in colloquy and under oath."

The record does not support these statements.

The first of these witnesses to testify was B. P. Alschuler (R. 376). A striking example of how specific his cross-examination with respect to the prior contradictory testimony was, the position of the Government's attorney on the question and the trial court's ruling, appear in his cross-examination (R. 386, 387). Petitioner's counsel, making inquiry concerning this prior testimony, asked:

"Q. You told him that was not true, did you? A. Well, I don't remember the language.

Q. Sir? A. I don't remember the language.

Q. Well, can you give us substantially what you said when he inquired about that? A. Well, I cannot, because I don't remember. If he had asked the question one way, I might have said no, and if he had asked it another way, I might have said yes, but that is the substance of the answer, at least.

Mr. Leahy (addressing Mr. Blanton): Will you let me have a copy of that examination?

Mr. Blanton: On what basis are you asking for it, Mr. Leahy?"

Then follows (R. 387) a statement by petitioner's counsel that it was desired so that the jury might compare his original sworn testimony with his changed testimony at the trial, which went directly to the weight and credibility of his testimony, and also to show what promises of immunity may have been made before the testimony was changed. The Government's attorney then stated (R. 387):

"Mr. Blanton: He has admitted that he has changed his testimony. I think that concludes the matter.

The Court: Objection sustained.

Mr. Gallagher: Exception."

We will not burden this brief by setting forth all of the cross-examination on this point of those who were at all cross-examined as to their prior testimony, but merely direct the Court's attention to those places in the record where it may be found. The balance of this cross-examination of this witness appears (R. 389, 390) and was set forth in the petition for rehearing (R. 1283, 1284).

The second of these witnesses to testify was Rex H. Fowler (R. 396). His cross-examination on this matter appears (R. 398) and was quoted in the petition for rehearing (R. 1285).

Another was witness L. H. Keller (R. 533). His cross-examination on this point appears (R. 554) and is set forth in the petition for rehearing (R. 1289).

Another instance is that of witness Frederick J. Martin (R. 965). His cross-examination appears R. 966 and is quoted in the petition for rehearing R. 1288.

The cross-examination of witness Harry Williamson is found R. 464-467 and 907, 908, and was directed to the attention of the court below in the petition for rehearing R. 1285-1288.

The cross-examination of Eugene R. Kropp appears R. 758; that of George K. Miltenberger R. 568, 569; the cross-examination of E. B. Hamilton on this subject is found R. 491. The testimony of Albert C. Laun on this point under both direct and cross-examination appears R. 997, 998. Herman Spoehrer, who, next to Laun, was the Government's most important witness, denied that he had given different testimony when he testified before the Commission (R. 638).

An examination of this cross-examination of these witnesses discloses that there was no cross-examination as to the material details of the prior conflicting testimony, and,

of course, petitioner's counsel being deprived of an opportunity of examining a transcript of this prior testimony, were unable to formulate specific questions with respect thereto. The Court will note that in some instances the witnesses could not remember what they had previously testified to or their admissions were only partial and the answers sometimes indefinite. In most cases the cross-examination was limited to the mere admission that the witness had previously testified differently. Petitioner had a right to cross-examine these witnesses in detail as to what their prior testimony had been with respect to the material and relevant facts, so that the jury might weigh that testimony along with that given at the trial by these witnesses to determine the weight and credibility of their testimony. It was a matter for the jury to decide and not for the witness to state upon which occasion he had told the truth. If the transcript of the prior testimony of the witnesses had been available, they could be placed in a proper setting with respect to the circumstances under which their prior testimony branded as false was given. It would show whether or not prior to giving the testimony they had been warned of the penalty for false swearing. It would have disclosed what promises of immunity were made or what inducements were offered before they changed their testimony.

In holding that petitioner was not erroneously denied the right of cross-examination in this case the opinion of the Court below is in conflict with the decisions of this Court in Alford v. United States, 282 U. S. 687, and District of Columbia v. Clawans, 300 U. S. 617, in which cases this Court, in opinions by Mr. Justice Stone, now Chief Justice, held that the limitation of the right of cross-examination constituted reversible error. In the first cited cases this Court states (282 U. S., l. c. 691, 692):

"Cross-examination of a witness is a matter of right.

> * * * Its permissible purposes, among others, are * * * that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment * * *; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * * It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

In the Clawans case this Court states, 300 U. S., l. c. 632:

> "Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, and particularly in circumstances where the excluded questions having a bearing on credibility and on the commission by the accused of the acts relied upon for conviction, passes the proper limits of discretion and is prejudicial error."

The court below in an earlier opinion, speaking through the then Senior Circuit Judge, Walter H. Sanborn, in the case of Heard v. United States, 255 Fed. 829, well states the rule of law as follows (l. c. 832):

> "But neither of these facts extracts the serious objection to the prohibition of the cross-examination of the witness as to his contradictory statements in detail of the facts and circumstances of the robbery or larceny. The government had called him as its chief witness, and relied upon him to establish its charge. By thus calling him it had vouched for the

truth of the story of the transaction to which he testified, and had subjected him to a fair and full cross-examination upon that subject. It was proper, relevant and material cross-examination to draw forth from the witness the fact that, when the transaction was recent and his recollection was fresh, he had told a different story, one so inconsistent with that to which he had testified that both stories could not be true. That was material cross-examination, because it at once challenged the credibility of his testimony, and the more in detail his first story was the more incredible it rendered his evidence. Neither a witness nor a party may lawfully escape such cross-examination by his mere testimony or admission that the witness has made statements inconsistent with his testimony at the trial and that they were false. Cross-examination may not be shut off in this way. The cross-examiner has the right to prove by his adversary's witness, if he can, what inconsistent statements he has made, not only in general, but in every material detail, for, the more specific and substantial the contradictory statements were, the less credible is the testimony of the witness. * * * A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

The same Court in Searway v. United States, 184 Fed. 716, held (l. c. 717):

"The rule is general and well settled that a categorical denial by a witness is not an essential preliminary to his impeachment. It is sufficient, his attention being properly directed, if there is forgetfulness, partial admission, or an uncertain, evasive, or indefinite answer. The important thing is the inconsistency in the statements as affecting the credit of the witness, and the preliminary inquiry is merely to give opportunity for explanation."

In Chicago, M. & St. P. Ry. Co. v. Harrelson, 14 Fed.

(2d) 893, 896 (C. C. A. 8), the Court held that the admission by a witness of self-contradiction in prior statements would not deprive the other party of the right to show the statement, because the admissions were not unambiguous and unequivocal.

In United States v. Graham, 102 Fed. (2d) 436 (C. C. A. 2nd), the Court, speaking of the right to bring out prior inconsistent testimony in cross-examination for purposes of impeachment, stated (l. c. 442):

> "No one could tell whether or not it was false without knowing what it was, and so the examination of this witness as to former testimony was properly allowed to proceed as it did."

For other cases treating of this same subject see Henderson v. United States, 20 Fed. (2d) 90 (C. C. A. 8th), and Tacoma Ry. & Power Co. v. Cothary, 235 Fed. 872 (C. C. A. 9th).

In the foregoing respects the decision of the court below is contrary to, and in conflict with, the cited decisions of this Court, those of other circuits, and its own prior decisions.

POINT C.

[Specification of Error 1 (d).]

The decision of the Court below places the burden upon petitioner to affirmatively show that the transcripts of the prior contradictory testimony of the witnesses contained relevant and material matter. The opinion states (R. 1263):

> "The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative."

And again (R. 1266):

> "There is no reason to believe that any matter con-

tained therein was competent, relevant or material matter of defense."

The incorrectness of these statements is conclusively shown by the mere fact that it was admitted by all of these witnesses, with one exception, that they had given testimony at the prior time which was different from that given at the trial and absolutely contrary thereto, and every one of these witnesses was a material witness who gave testimony bearing directly on the principal issues in the case. The unfairness of this ruling is apparent when consideration is given to the fact that petitioner had no opportunity to make a showing by reason of the trial court's refusal to order production of the transcript. However, this Court has held that the burden of making this showing is not upon the cross-examiner. See Alford v. United States, 282 U. S. 687. This Court in that case states (l. c. 692):

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. * * * It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the Court what facts a reasonable cross-examination might develop. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

In holding to the contrary the decision of the court below is in conflict with the opinion of this Court in the Alford case.

POINT D.

[Specification of Error 2.]

Petitioner requested the Court to charge the jury that an established reputation for good character standing alone might create a reasonable doubt, although without it the other evidence might be convincing, which was refused and exception saved (R. 1092). Petitioner then requested the Court to charge the jury that evidence of good character was in the same category as other evidence and must be considered and that it might of itself, if believed, create a reasonable doubt, where otherwise no reasonable doubt would exist. This was refused by the Court on the alleged reason that it was covered by the charge. Exception was saved to this ruling (R. 1093). The Court charged the jury (R. 1103) to the effect that reputation for good character was to be considered with the other facts and circumstances of the case; that the jury was warranted in considering such evidence whether the case was clear or doubtful for the purpose of raising and making out a reasonable doubt; that if, when considered with all the other evidence, it should raise a reasonable doubt, the defendant was entitled to an acquittal, but if all the evidence in the case, including that on good reputation, convinced the jury of guilt beyond a reasonable doubt, "then his previous good reputation cannot excuse, mitigate or palliate such guilt to any extent whatever." Exception was taken to this charge (R. 1107).

The question whether or not the accused in a criminal case is entitled to a charge that good reputation alone may raise a reasonable doubt, has led to much confusion in the decisions.

In Edington v. U. S., 164 U. S. 361, this Court held that it was reversible error to give a charge which permitted

consideration of evidence of good character only if the rest of the evidence created a doubt of guilt. This Court there stated (l. c. 366):

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

We find no later case in which this Court has passed on this question.

An examination of the charge given in this case (R. 1103) shows that the Court did not include therein a statement that this evidence alone might raise a reasonable doubt.

The Court of Appeals of the District of Columbia has held that the refusal of a charge such as was requested here and the giving of a charge very similar to the one here given, constituted reversible error; that under the authority of the Edington case a defendant was entitled to an instruction that evidence of good reputation alone would raise a reasonable doubt.

Egan v. United States, 287 Fed. 958, 968.

This was again held by the same Court in Jones v. United States, 289 Fed. 536, 538.

That Court again recognized this as the correct rule in Kinard v. United States, 96 Fed. (2d) 522, 523.

The Seventh Circuit, in the case of Snitkin v. United

States, 265 Fed. 489, 491, held, upon the authority of the Edington case, that it was error to refuse to charge the jury that reputation of good character alone might raise a reasonable doubt.

The Tenth Circuit, in Miller v. United States, 120 Fed. (2d) 968, 971, adheres to the view that, under the authority of this Court's decision in the Edington case, the defendant is entitled to have the jury charged that good character evidence alone may create a reasonable doubt, although without it the other evidence would be convincing.

The Eighth Circuit, to which the petition for certiorari in this case is directed, seems to have held both ways, although the great majority of its decisions are to the effect that a defendant is not entitled to an instruction on the effect of reputation for good character which permits such evidence standing alone to raise a reasonable doubt. We cite those cases supporting our contention. Thus, in Perara v. United States, 235 Fed. 515, 517 (C. C. A. 8th), that Court quoted with approval that portion of a given charge which permitted a reasonable doubt justifying an acquittal to be based upon evidence of good character alone. The case was reversed because the Court found that the balance of the charge destroyed the effect of such evidence, the Court stating (l. c. 517):

> "By direct statement, innuendo and suggestion it, in effect, nullified the true rule as first stated, and made good reputation of doubtful value and probably a positive disadvantage to the defendant."

In Searway v. United States, 184 Fed. 716 (C. C. A. 8th) the Court refused a request to charge the jury that evidence of good character might of itself create a reasonable doubt, though without it no such doubt would exist, that such evidence was to be considered with all the other facts and circumstances of the case. Instead, the Court

charged that he could not be acquitted on that ground if the jury found from the other evidence in the case that he was guilty beyond a reasonable doubt. The Court held this to be reversible error.

In Estabrook v. United States, 28 Fed. (2d) 150 (C. C. A. 8th), the same Court held that an instruction to acquit if, after considering all of the testimony including that bearing on good reputation, the jury had a reasonable doubt of guilt, did not require reversal because of the Court's failure to charge that defendant's good reputation alone might engender a reasonable doubt requiring acquittal, because there was no exception to the instruction given nor a request for an instruction covering the omission. In that opinion the Circuit Court of Appeals for the Eighth Circuit stated (l. c. 154):

> "This circuit has repeatedly held that a defendant's good reputation may alone engender in the minds of the jurors such a reasonable doubt as to entitle him to an acquittal. Sunderland v. United States (C. C. A.), 19 Fed. (2d) 202. Of course, it may also create a doubt when considered in connection with the other evidence in the case, as the court charged. Of this we may say as we said of the instruction on circumstantial evidence, no request was made that the Court additionally charge the jury that good reputation alone might raise a reasonable doubt. Indeed, no exception or reference of any kind was made by defendant's counsel to this instruction."

In the case now at bar, a request for instructions embodying the rule here contended for were specifically requested and refused and exception saved and the Court's given charge permitted it to raise a reasonable doubt only when considered with the other evidence in the case. To thus limit its purpose is, as was said by the Court of Appeals of the District of Columbia in the Egan case, supra, quot-

ing from opinions of the Supreme Courts of California and Utah (People v. Bell, 49 Cal. 485; State v. Brown, 39 Utah 140), "not telling them anything beyond letting in the evidence." Also the concluding paragraph of this portion of the charge (R. 1103), "but if all the evidence in the case, including that which has been given on the matter of good reputation, convinces you of his guilt beyond a reasonable doubt, then his previous good reputation cannot excuse, mitigate or palliate such guilt to any extent whatever," nullifies any benefit which the petitioner might have received from this evidence.

Thus, it will be seen that on this point there is a conflict between the Circuits and, to some extent at least, within the Eighth Circuit itself, and we respectfully suggest that the decision here is in conflict with the opinion of this Court in the Edington case, and that this Court should accept jurisdiction and determine the matter.

POINT E.

[Specification of Error 3.]

The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony upon which the perjury charge is based. This must be shown by two witnesses or by one witness with circumstances of satisfactory corroboration. The Court recognized this rule in its charge (R. 1099, 1104). Petitioner requested a charge (R. 1093) which stated this rule, and, in addition, contained the following:

> "Circumstantial evidence of itself or corroborative evidence of itself is not sufficient to support a charge of perjury."

This was refused and exception saved. This latter portion of the refused charge was, of course, equally correct,

as circumstantial evidence alone cannot support a charge of perjury.

Clayton v. United States, 284 Fed. 537, 539 (C. C. A. 4th);
United States v. Otto, 54 Fed. (2d) 277, 279 (C. C. A. 2nd);
Phair v. United States, 60 Fed. (2d) 953, 954 (C. C. A. 3rd).

The Court in its charge, however, also instructed the jury as follows (R. 1102):

> "I need scarcely tell you that proof of a crime may be either by direct or circumstantial evidence. Either is sufficient."

Then follows an explanation of what constitutes direct evidence and what constitutes circumstantial evidence. This paragraph of the charge then concludes (R. 1103):

> "These circumstances, I charge you, ought to be consistent with each other and consistent with the guilt of the defendant, and inconsistent with reasonable hypothesis of the defendant's innocence."

The refusal of petitioners' charge that circumstantial or corroborative evidence is insufficient to support a charge of perjury was error, and doubly so when the Court expressly charged directly to the contrary.

On appeal complaint was made of this action by the trial court. The opinion of the Circuit Court of Appeals holds that this was not error because the jury was fully informed of the exception applicable to a perjury case. The opinion states (R. 1270):

> "It appears that in the part of the court's general instructions relating to the kind of proof by which commission of a crime may be made, the court declared the general rule that it may be by direct or circumstantial evidence, either of which is sufficient, and the two kinds of evidence were described. That

> the general law was correctly stated is not questioned and it is clear from the instructions given that the jury was fully informed of the special exception applicable to the perjury charge. We find no error in giving or refusing instructions concerning the quantum of evidence upon the perjury charge."

In so holding, the decision is in conflict with that of this Court in Mills v. United States, 164 U. S. 644, 646, which holds that an incorrect portion of a charge cannot be held to be harmless even though it be urged that in other portions of the charge the correct rule was stated.

It is also contrary to and in conflict with the Circuit Court of Appeals for the Third Circuit in Nicola v. United States, 72 Fed. (2d) 780, where it is stated:

> "Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

The Court cites in support of this statement, among other authorities, this Court in Mills v. United States, supra. In this respect the opinion is also contrary to and in conflict with the Circuit Court of Appeals for the Ninth Circuit in De Groot v. United States, 78 Fed. (2d) 244, 248, 253, which holds that an erroneous portion of a charge is not cured by stating the correct rule in other portions of the charge.

POINT F.

[Specification of Error 4.]

After the case had been under consideration by the jury for twenty-six hours without an agreement a supplemental charge was given by the Court (R. 1109-1111). Thereupon the jury retired for further deliberation (R. 1113) and in

thirty-seven minutes returned a verdict of guilty on the fourth and fifth counts of the indictment and not guilty on the first, second and third counts (R. 1114). Counsel for petitioner made strenuous objection to this charge and took exception thereto on the ground that it was coercive (R. 1111). Complaint was made on appeal, but the opinion below sustains the charge (R. 1275, 1276). It will be noted from reading this instruction that it stresses the fact that the trial had been long and expensive and that failure to reach a verdict would necessitate another expensive trial. It repeatedly emphasized the fact that a verdict should be returned and contained repeated admonitions with reference to the duty of the jurors to accord deference to each other's opinions and charged them that they should come to an agreement at least upon some of the counts, and informed the jurors that by adopting the suggestions contained in this instruction they would inevitably come to an agreement. Six times the Court in this charge emphasizes that a verdict should be returned:

1. "It is, therefore, very desirable that you should agree upon a verdict" (R. 1109).

2. "It is your duty to decide the case if you can conscientiously do so" (R. 1110).

3. "I can only say to you that the purpose of a trial is to arrive at a verdict, a just verdict, not a disagreement" (R. 1111).

4. "It is the duty of a jury to agree upon a verdict, and that is the purpose of a trial" (R. 1111).

5. "I think you ought to make every honest effort to come to an agreement at least upon some of the counts, one or more" (R. 1111).

6. "It is your duty to adjust your differences of opinion, if any, * * * such a method adopted by reasonable men having due regard to the opinions of your fellow jurymen will almost inevitably lead to an agreement and a just verdict" (R. 1111).

The jury was three times impressed with the fact that a disagreement would necessitate another trial:

1. "Your failure to agree upon a verdict will necessitate another trial equally as expensive" (R. 1109).

2. "You should consider that the case must at some time be decided" (R. 1110).

3. "There is no reason to believe that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other" (R. 1110).

Five times is repeated an admonition with respect to their duty to accord deference to each other's opinions and in two of these instances the language is identical. These portions of the charge are as follows:

1. "You must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other" (R. 1110).

2. "You must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other" (R. 1111).

3. "You ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments" (R. 1110).

4. "It is your duty to adjust your differences of opinion, if any, by a comparison of views and by a discussion of the evidence, having your minds at all times open to the truth as may be impressed upon you by fair argument" (R. 1111).

5. "A dogged persistence not to listen to a fair discussion of the evidence or listen to fair argument, or listen to persuasive evidence or reason, is destructive of justice" (R. 1111).

This charge did not in any respect tend to assist the jury in its deliberations, but served only to force a verdict by coercion. Unquestionably, after twenty-six hours de-

liberation, some members of the jury, as stated by petitioner's counsel in their objections to the charge, had a reasonable doubt and this coercive charge would cause them to waive this doubt in favor of the opinion of the majority. The succeeding event proved the fact, as a verdict was obtained in thirty-seven minutes after giving this charge. And it is worthy of note in this connection that petitioner was acquitted on three counts of the indictment and convicted on two, where there was little, if any, difference in the proof adduced in support thereof.

The conclusion in the opinion below (R. 1276) that ability and energy of counsel tended to obscure the obvious and that, as the Judge said nothing to tilt the scale in the jury's hands, it could not be said that a verdict was improperly coerced, is to beg the question. There can be but one conclusion under the circumstances here existing with respect to whether or not the supplemental charge coerced a verdict. It unquestionably did, and even though the court below states that there was little room for reasonable doubt (R. 1275) the fact is beyond argument that twelve men had considerable doubt when they failed to reach a verdict in twenty-six hours. Whether or not the court below felt that the evidence was such as to leave little doubt in the Court's mind, nevertheless petitioner was and is entitled to his constitutional right of a fair trial.

In the situation presented the language of this Court in Burton v. United States, 196 U. S. 283, is most pertinent. In that case the jury, after having deliberated for more than thirty-six hours without reaching an agreement, were called into court and inquiry made as to how they stood and a further charge was given. This Court there said (l. c. 306, 307):

> "Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than

> 36 hours and had been unable to agree upon a verdict. * * * Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * A slight thing may have turned the balance against the accused under the circumstances shown by the record."

The opinion states (R. 1275) that this charge was substantially the same as that approved by this Court in Allen v. United States, 164 U. S. 492, 501, and that given in United States v. Allis, 73 Fed. 165, 182, affirmed by this Court, 155 U. S. 117. As a matter of fact this instruction was obtained by taking the charge given in Commonwealth v. Tuey, 8 Cush. 1 (Mass.); also in the Allen case by this Court, supra, the Allis case given on the Circuit (73 F. 165, 182); United States v. Commerford, 64 Fed. (2d) 28, 31 (C. C. A. 2nd), and Shaffman v. United States, 289 Fed. 370, 374 (C. C. A. 3rd). Everything deemed of assistance to the Government in the charge in each of those cases was taken and combined into one charge, which is the one here given. This no doubt accounts for the many repetitions in the instruction. It is not correct to say, as the court below did, that this is substantially the charge in the Allen case, as a reference to that case, 164 U. S., l. c. 501, will show. That charge did not repeatedly emphasize the importance of returning a verdict or repeatedly admonish the jurors of their duty to acquiesce in the conclusion of the majority. Neither is it correct that this Court approved the instruction given in United States v. Allis, 73 Fed. 165, 182, although courts of appeal of the various circuits have not infrequently so stated. A reading of this Court's opinion in the Allis case, 155 U. S. 117, 120, 121, leaves considerable doubt that the supplemental charge appearing at 73 Fed. 182 was in its entirety con-

tained in the record before this Court. It certainly does not appear in this Court's opinion, at pages 120, 121 of that case, where a summary of the charge is given, and this Court specifically states (l. c. 121) that the quoted portions of the charge were the only portions contained in the record. In any event, this Court specifically refused to pass upon the alleged error that the court below gave a coercive charge for the reason that no objection or exception on that ground was taken in the trial court.

The opinion below also cites in support of its ruling sustaining this instruction Nigro v. United States, 4 Fed. (2d) 781, 785 (C. C. A. 8th), and Stewart v. United States, 300 Fed. 769, 785 (C. C. A. 8th). In both these cases, however, the same Court held the giving of supplemental charges not as strong as the one here in question to constitute error. The same Court condemned instructions of this nature in Edwards v. United States, 7 Fed. (2d) 598, 602; C. & E. I. Ry. Co. v. Sellars, 5 Fed. (2d) 31, 32 (C. C. A. 8th), and Gideon v. United States, 52 Fed. (2d) 427, 431 (C. C. A. 8th); and the Ninth Circuit condemned a supplemental instruction in Peterson v. United States, 213 Fed. 920, 924.

It is respectfully suggested that the opinion of the court below in approving this instruction has so far departed from the accepted and usual course of judicial proceedings and sanctioned such departure by the lower court as to call for an exercise of this Court's power of supervision.

CONCLUSION.

It is respectfully submitted that petitioner was denied a fair trial in this case; that it is one calling for the exercise by this Court of its supervisory powers, in order that the conflicts between the decision of the court below and those of other circuits, and this Court, be determined,

and so that petitioner may be accorded the fair and impartial trial to which he is entitled under the Constitution, for, as this Court has recently stated, "free speech and fair trials are two of the most cherished policies of our civilization" (Bridges v. State of California; The Times Mirror Co. et al. v. The Superior Court of California, Nos. 1 and 3, October Term, 1941). That to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Eighth Circuit and reverse it.

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